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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARY DREXLER, formerly the Sheriff of Tazewell County, and RALPH HODGSON, Sheriff of Tazewell County,

Petitioners,

v.

ROBERT LICKISS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals abdicated its obligation to independently determine the content and scope of the First Amendment when it concluded, solely on the basis of the Plaintiff sheriff's sergeant's civil service status, that the Plaintiff did not occupy a position of trust within the sheriff's department, in conflict with the approach mandated in *Branti v. Finkel*, 445 U.S. 507 (1980), and with decisions from the First, Third, Fourth, and Sixth Circuits.

2. Whether, in concluding that Plaintiff's civil service protections qualified him as a nonconfidential employee under *Branti*, the Seventh Circuit deprived Defendants of any consideration of their claim to qualified immunity on Plaintiff's First Amendment claim when it failed to determine whether Plaintiff's status as a nonconfidential employee was clearly established.

3. Whether the court of appeals' conclusion that principles of due process entitled the Plaintiff sheriff's sergeant, who was suspended without pay for twelve days, to a presuspension hearing, in addition to a pretermination hearing, contravened this Court's decision in *Gilbert v. Homar*, 117 S. Ct. 1807 (1997).

4. Whether, in holding that the Plaintiff's right to a presuspension hearing was clearly established, the court of appeals' sole reliance on an overruled decision from 1975 and its failure to consider this Court's decision in *Gilbert v. Homar*, 117 S. Ct. 1807 (1997), deprived Defendants of fair consideration of their claim to qualified immunity on Plaintiff's due process claim.

PARTIES TO THE PROCEEDINGS

Respondent Robert Lickiss brought this action against the County of Tazewell and Petitioners Mary Drexler, former sheriff of Tazewell County, and Ralph Hodgson, Sheriff of Tazewell County. There are no other parties to these proceedings.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 141 F.3d 1220 and is reprinted in the Appendix. (App. 1-6). The opinion of the United States District Court for the Central District of Illinois, Peoria Division, has not been reported. It is reprinted in the Appendix. (App. 9-31).

JURISDICTIONAL STATEMENT

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals for the Seventh Circuit entered judgment on April 21, 1998. (App. 1). Petitioners filed a Petition for Rehearing, which was denied on June 30, 1998. (App. 7-8). This Petition for a *Writ of Certiorari* was filed within 90 days of the denial of the Petition for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment I; United States Constitution, Amendment XIV, § 1; and 42 U.S.C. § 1983 are implicated in this case.

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

During the 1994 campaign for sheriff in Tazewell County, Illinois, Respondent Robert Lickiss ("Lickiss"), a sergeant in the sheriff's department, actively supported and campaigned for the republican candidate for sheriff. (R. 1, ¶¶ 12-15, 17, 31-34, 40, 43; R. 92, Ex. 4 at 80-84). The democratic candidate for sheriff was Chief Deputy Sheriff Ralph Hodgson ("Hodgson"), whose candidacy was supported by interim Sheriff Mary Drexler. (R. 1, ¶ 13).[1]

In July 1994 Lickiss received a complaint that Deputy Sheriff Michael Steinborn ("Steinborn") had been pestering girlfriend Kathy Lund's relatives and their coworkers in an attempt to locate Ms. Lund. (R. 92, Ex. 3; Ex. 4 at 135-37). Lickiss was further informed that when Steinborn discovered Lund with another man, Steinborn began hitting himself in the head, and he placed his service revolver to his head and threatened to kill himself in Lund's presence.[2] (*Id.*). Steinborn supported Hodgson's candidacy for sheriff. (R. 1, ¶ 17).

When Sergeant Lickiss informed Drexler and Hodgson about the complaint against Steinborn, Sheriff Drexler instructed Lickiss to prepare a written report of the incident and to provide a copy to Tazewell County Assistant State's Attorney Stewart Umholtz ("Umholtz").

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[1] Sergeant Lickiss was hired and promoted under a merit commission system. (R. 96, Ex. 18 at 488). Throughout this Petition, the terms "merit commission" and "civil service" will be used interchangeably.

[2] The court of appeals' statement that Steinborn had threatened anyone other than himself is not supported by the record.

(R. 92, Ex. 5 at 34-35; Ex. 6 at 5-7; Ex. 7 at 503-04). Sheriff Drexler then placed Steinborn on a forced vacation and required him to obtain clearance from a psychiatrist before returning to work. (R. 92, Ex. 1 at 60-61; Ex. 5 at 35-36; Ex. 6 at 5-6; Ex. 8 at 1). Sheriff Drexler instructed Sergeant Lickiss to do no further investigation on the case, told him not tell anyone about the matter, and told him that she would ask the Illinois State Police Department of Criminal Investigations to investigate. (R. 92, Ex. 4 at 143-48; Ex. 6 at 7; Ex. 7 at 504-05; Ex. 8 at 1). The Illinois State Police subsequently declined Drexler's request to conduct an investigation. (R. 92, Ex. 5 at 46).

On August 23, 1994, Lickiss informed Umholtz that he had further information on the Steinborn matter which he would provide to Umholtz in a report, but that he would not provide the information to the sheriff or the chief deputy. (R. 92, Ex. 8 at 2-3). On August 30, 1994, Lickiss delivered a report to Umholtz stating that on August 23 the original complainant told Lickiss that when she originally told him about Steinborn, she forgot to mention that Steinborn had continued to visit Lund's relatives' house after he had been asked to stop. (R. 92, Ex. 15).

In early October 1994 Sheriff Drexler was informed that Sergeant Lickiss had compiled yet another report concerning Steinborn and that Lickiss had worked on it during overtime. (R. 92, Ex. 2 at 294-301, 354-56; Ex. 5 at 80-82; Exs. 17-20). Pursuant to Sheriff Drexler's order, Sergeant Lickiss gave Drexler a computer disk containing the reports and other documents that he prepared while on duty October 6. (R. 92, Ex. 5 at 82;

Exs. 22-24). The computer disk contained a report to the Tazewell County State's Attorney summarizing an interview Sergeant Lickiss conducted with Lund on September 26 regarding her relationship with Steinborn. (R. 92, Ex. 25). In addition, the computer disk contained a five-page letter from Sergeant Lickiss to the republican candidate for sheriff, which included issues the candidate could use in his campaign against Chief Deputy Hodgson and which strongly criticized Drexler, Hodgson, and the current administration. (R. 92, Ex. 26; Ex. 54). Portions of the letter were prepared while Sergeant Lickiss was on duty. (R. 92, Ex. 7 at 587; Ex. 4 at 80-84; Ex. 54 at 21-32).

On October 12, 1994, Drexler assigned two detectives to investigate the Steinborn/Lund matter and Lickiss' activities in connection therewith. (R. 92, Ex. 22). Among other things, the detectives advised Sheriff Drexler that they learned that Lickiss had been speaking with a local newspaper reporter concerning the Sheriff's lax handling of the Steinborn matter. (R. 92, Ex. 33; Ex. 41 at 8). On October 14, 1994, that newspaper reporter published an article that quoted Lickiss directly and which strongly criticized the sheriff's department's handling of the Steinborn matter. (R. 92, Ex. 34).

On October 19, 1994, Sheriff Drexler sent Sergeant Lickiss a letter advising him that he was "being suspended without pay, pending an investigation for further discipline up to and including discharge." (R. 92, Ex. 44). The letter described the basis of the discipline as: (1) unlawful release of information from an employee personnel file; (2) insubordination; (3) improper

conduct while on duty; (4) cooperation in investigations; (5) criticism of employees or direct orders; (6) truthfulness; (7) intervention; and (8) political activities while on duty. (*Id.*). Eight days later a labor attorney who was assisting Drexler sent Lickiss a letter advising that the "Department has substantially completed their investigation and based upon the information that we presently have, believe that there is just cause to terminate your employment." (R. 92, Ex. 46, p. 1). The letter stated that "[b]efore we make our decision to terminate final, we want to give you an opportunity to respond to the charges that we informally notified you of on October 19, 1994, as well as others that are included with this correspondence." (*Id.*, p. 1). The letter then elaborated on the eight charges listed in the October 19 letter and added others. (*Id.*, pp. 1-3). The charges focused primarily on Lickiss' continued investigation of the Steinborn/Lund matter, his release of information to the press and private parties, and his June 7, 1994, political letter to the republican candidate for sheriff. (*Id.*) The letter scheduled a meeting with Sheriff Drexler for October 31, 1994, at which Lickiss would "be given an opportunity to present [his] side of the violations [he had] been charged with." (*Id.*, p. 3).

On November 28, 1994, Sheriff Drexler sent a letter to Lickiss advising that he was terminated as of that date. On December 1, 1994, Lickiss filed a formal notice of grievance. (R. 92, Ex. 48). On that same day Hodgson assumed the office of sheriff after having defeated the republican candidate in the November sheriff's election. (R. 92, Ex. 1 at ¶ 15; Ex. 49). In February 1995 Hodgson notified Lickiss that he was reinstated and that his discipline was reduced to a two-week unpaid

suspension and a demotion from sergeant to deputy. (R. 92, Ex. 50). Lickiss subsequently filed a grievance against his suspension and demotion. (R. 92, Ex. 51). An arbitration hearing was held on four separate dates, during which time Lickiss, who was represented by counsel, presented evidence and argument in support of his grievance. (*Id.*; Ex. 52 at 1-2). The arbitrator upheld Lickiss' demotion but overturned his two-week suspension and awarded him back pay on the ground that he should have had an opportunity to present his side of the story before the October 19 notice of suspension. (*Id.* at 60).

Lickiss filed a two-count complaint under 42 U.S.C. § 1983 in the Federal District Court for the Central District of Illinois, Peoria Division, against the County of Tazewell and Petitioners Drexler and Hodgson. In Count I Lickiss alleged that the disciplinary actions against him violated his First Amendment right to provide political support to Hodgson's adversary in the upcoming election and his First Amendment right to investigate and report Steinborn's misconduct to the Tazewell County State's Attorney. (R. 1). In Count II Lickiss alleged that his procedural due process rights were violated when he was suspended without pay on October 19, 1994, without first being afforded a pre-suspension hearing. The district court had jurisdiction over the complaint pursuant to 28 U.S.C. §§ 1331 and 1343(3). (*Id.*).

The district court *sua sponte* dismissed that portion of Count I which alleged political retaliation. Following discovery, Drexler and Hodgson moved for summary judgment on the remaining free speech and due process

claims on the grounds of qualified immunity. The district court denied the motion in its entirety. (App. 9-31).

Drexler and Hodgson appealed the denial of their claims of qualified immunity. On April 23, 1998, the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision. (App. 1-6). In its opinion the Seventh Circuit merged its analysis of the First Amendment and due process claims. It concluded that Lickiss' clearly established due process rights were violated because he was not afforded a presuspension hearing. In doing so, the court ignored this Court's recent decision in *Gilbert v. Homar*, 117 S. Ct. 1807 (1997). In denying qualified immunity on Lickiss' First Amendment claim, the court of appeals held that Lickiss did not occupy a position of trust because he enjoyed merit commission protections which required cause for disciplinary actions. Over the dissent of two judges, Drexler and Hodgson's Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied by the Seventh Circuit on June 30, 1998. (App. 7-8).

REASONS FOR GRANTING THE WRIT

I.

The Court Of Appeals Abdicated Its Obligation To Independently Determine The Content And Scope Of The First Amendment When It Concluded, Solely On The Basis Of The Plaintiff Sheriff's Sergeant's Civil Service Status, That The Plaintiff Did Not Occupy A Position Of Trust Within The Sheriff's Department, In Conflict With The Approach Mandated In *Branti v. Finkel*, 445 U.S. 507 (1980), And With Decisions From The First, Third, Fourth, And Sixth Circuits[3]

The duties performed by Illinois deputy sheriffs entail sufficient input into the Sheriff's policymaking function that the Seventh Circuit Court of Appeals has labeled them "confidential" employees[4] who may be terminated for political reasons. *Upton v. Thompson*, 930 F.2d 1209, 1213-16 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992).[5] An Illinois sheriff need not tolerate political

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[3] The Seventh Circuit's decision conflicts with *Ortiz-Pinero v. Rivera-Arroyo*, 84 F.3d 7 (1st Cir. 1996), *Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986); *McCrerey v. Allen*, 118 F.3d 242 (4th Cir. 1997), and *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990).

[4] The use of the terms "confidential" or "policymaking" employees is technically inaccurate, but commonly applied for convenience sake. In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court emphasized that the proper focus is on whether the position is one for which political affiliation is an appropriate requirement, and that designations such as "confidential" or "policymaking" are merely relevant factors in the calculus.

[5] The federal courts of appeals are divided on the question of whether deputy sheriffs occupy positions for which political affiliation is an appropriate requirement. *Compare Upton*, 930 F.2d 1209, *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989)

(continued...)

disloyalty from her deputies because the sheriff depends almost entirely upon those deputies to implement her political and law enforcement agendas. Because deputies frequently work autonomously, they enjoy wide latitude and discretion in the performance of their duties and in the implementation of department goals. *Id.* at 1215. They are, therefore, particularly well positioned to either promote or sabotage the sheriff's political and law enforcement agendas.

A sheriff's right to count on the loyalty of her deputies is not diminished, indeed it is enhanced, when the deputy ventures beyond mere political party membership into public criticism of his employer. For that reason, the Seventh Circuit has applied *Branti*'s confidential employee exception with full force to the line of cases involving retaliation against speech on matters of public concern. *See Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993). In support of that extension, Judge Posner reasoned in *Wilbur* that "[i]t would be a strange rule that gave more job protection to policymaking employees who vociferously attack their superiors than to policymaking employees who do their best to serve

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[5] (...continued)
(to say that sheriffs may not demand political loyalty from their deputies is "beyond the bounds of common sense"), *and Jenkins v. Medford*, 119 F.3d 1156, 1164 (4th Cir. 1997) (deputy sheriffs are policymakers and are the alter ego of the sheriff), *cert. denied*, 118 S. Ct. 881 (1998), *with Matherne v. Wilson*, 851 F.2d 752, 761 (5th Cir. 1988) (deputy sheriffs may not be terminated for political disloyalty), *Burns v. County of Cambria*, 971 F.2d 1015, 1023 (3d Cir. 1992) (deputies occupy nonpolicymaking positions), *cert. denied*, 506 U.S. 1081 (1993) *and Francia v. White*, 594 F.2d 778, 782 (10th Cir. 1979) (deputies are nonconfidential, nonpolicymaking employees).

those superiors faithfully but have the misfortune to belong to the wrong party. It would give policymaking employees and other sensitive employees an incentive to attack their bosses in order to retain their jobs." *Id.* at 219. *See also Warzon v. Drew*, 60 F.3d 1234, 1238 (7th Cir. 1995) (stating that the "patronage policymaker exception is also applicable to the *Pickering*[6] analysis").[7]

Notwithstanding these principles, the lower court denied the Defendants, the former and current sheriffs of Tazewell County, Illinois, qualified immunity on a

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[6] *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), require the courts to balance individual versus governmental interests in determining whether a public employee may be disciplined for speaking out on matters of public concern.

[7] The federal courts of appeals disagree as to whether the *Branti* exception should apply to *Connick/Pickering* cases. While only the Seventh Circuit has adopted a wholesale *Branti* exception for such cases, the First and Ninth Circuits have indicated in *dicta* that a *Branti* exception for *Connick/Pickering* claims may be cognizable. *See, e.g., Flynn v. City of Boston*, 140 F.3d 42, 47 (1st Cir. 1998) (where employee is subject to termination for political reasons under *Branti*, employer may consider employee's views on department matters in deciding whether to terminate employee); *Fazio v. City and County of San Francisco*, 125 F.3d 1328, 1332 (9th Cir. 1997) (First Amendment speech claims of policymakers are analyzed under rubric of *Elrod/Branti*), *cert. denied*, 118 S. Ct. 1517 (1998). In contrast, the Second and Eleventh Circuits have refused to recognize a *Branti* exception for *Connick/Pickering* claims. *See, e.g., McEvoy v. Spencer*, 124 F.3d 92, 102 (2d Cir. 1997) (employees' policymaking status is not dispositive, though it weighs very heavily, in *Connick/Pickering* analysis); *Cutliffe v. Cochran*, 117 F.3d 1353, 1358 (11th Cir. 1997) (*Pickering* analysis required if employee engaged in expressive conduct beyond manifesting political affiliation), *cert. denied*, 118 S. Ct. 1795 (1998).

First Amendment claim alleging that an Illinois deputy sheriff, indeed a sergeant within the sheriff's department, was disciplined on account of his report to the local state's attorney concerning a fellow deputy's alleged misconduct. The Plaintiff sergeant's continued investigation of his fellow deputy and his subsequent report to the state's attorney were both indisputably in direct contravention of the Sheriff's orders. The lower court justified this result solely on the grounds that Sergeant Lickiss did not qualify as a "confidential" employee within the meaning of the First Amendment because the County of Tazewell had granted him civil service protections. (App. 5). Significantly, the County's grant of civil service protections to the Plaintiff in no way altered the Plaintiff's statutory duties, which, as described above, had already been held sufficiently confidential in nature to render Illinois deputy sheriffs exempt from the First Amendment protections set forth in the *Elrod*[8]*/Branti* and *Connick/Pickering* lines of cases. *See Upton, supra*, 930 F.2d at 1215; *Wilbur, supra*, 3 F.3d at 219.

The court of appeals' reasoning is problematic in important respects. First, it has created a conflict among the circuits as to whether state civil service systems can, by themselves, expand the First Amendment protections of public employees who otherwise would be left to their remedies at state law. By and large, the courts of appeals in such cases have adhered to the principle, perhaps best expressed in *McCrerey v. Allen*, 118 F.3d 242, 244 (4th Cir. 1997), that a state law prohibiting consideration of political affiliation for a par-

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[8] *Elrod v. Burns*, 427 U.S. 347 (1976).

ticular position would not control a First Amendment analysis because "the content and scope of federal constitutional rights are matters of federal constitutional law." Accordingly, while the courts of appeals have properly recognized that a state's grant of civil service status can create due process entitlements in public employees, they have rejected the contention that such protections simultaneously expand First Amendment protections which would otherwise be unavailable to the employee because of her confidential or policymaking status in the government hierarchy.[9] *See Ortiz-Pinero v. Rivera-Arroyo*, 84 F.3d 7, 16 (1st Cir. 1996) ("State laws identifying government positions as 'trust' or 'confidential' are not dispositive of the federal law question whether a particular position is 'political'" within the meaning of *Elrod/Branti*); *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990) (city attorney who adequately alleged state law claim for breach of contractual "good cause" limitation on discharge could nonetheless be terminated for political reasons without violating the First Amendment); *Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986) (holding that plaintiff had no First Amendment claim under *Elrod/Branti* even though she stated a due process claim that she was terminated without cause).

This more cautious view of the impact of state civil service protections on the scope of an employee's First

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[9] The only Seventh Circuit decision to address whether state civil service protections can control a *Branti* analysis easily rejected the proposition. *See Shakman v. Democratic Organization of Cook County*, 722 F.2d 1307, 1310 (7th Cir.), *cert. denied*, 464 U.S. 916 (1983). The lower court in the instant case did not discuss its prior decision in *Shakman*.

Amendment rights has several distinct advantages over the approach taken by the Seventh Circuit in the instant case. From a practical viewpoint, it minimizes repetitive litigation by insuring that a state's grant of civil service protections will not give an otherwise remediless public employee two separate opportunities to litigate his discipline.[10] The instant case provides an excellent example of the pitfalls inherent in the court of appeals' approach. If he were noncivil service, the Plaintiff would have been without any right to challenge his discipline. As an at-will employee, no state law discharge claim would be cognizable. As a confidential employee (*see Upton, supra*, 930 F.2d at 1215), his First Amendment claim would have been foreclosed. *See Wilbur*, 3 F.3d at 219. Under the lower court's ruling, however, the County of Tazewell's grant of civil service protections to Plaintiff earned him not only a comprehensive arbitration hearing at which his objections to his suspension and demotion were extensively litigated and rejected, but also afforded him a second opportunity to contest his discipline in federal court under the First Amendment.

In addition to the practical problem presented by superimposing a second layer of litigation on top of the state's comprehensive arbitration process, the lower court's reliance on the Plaintiff's civil service status to expand his First Amendment rights lacks any sound constitutional grounding. In *Branti* this Court empha-

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[10] This Court has rejected the contention that principles of *res judicata* apply to civil rights claims arising out of disputes which were previously litigated in arbitration hearings. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

sized that the determination of whether an employee occupies a position of trust must focus on the nature of the duties and responsibilities of a particular position. *Branti v. Finkel*, 445 U.S. 507, 517-19 (1980). The *Branti* Court did not suggest that a state's grant of civil service protections would alter the analysis. Since *Branti*, the courts of appeals have uniformly assessed the scope of the exception by focusing on the duties inherent in a particular position. *See, e.g., Wrigley v. Greanias*, 842 F.2d 955 (7th Cir.), *cert. denied*, 488 U.S. 850 (1988); *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 881 (1998); *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997). If the nature and scope of a deputy's duties qualify the position as confidential under *Branti* (*see Upton*, 930 F.2d 1209), then simply anointing the position with civil service protections, without altering or diminishing the deputy's job duties, offers no constitutionally principled basis upon which to redesignate the position as nonconfidential for purposes of a First Amendment analysis.

Only by collapsing the First Amendment analysis with the due process analysis was the lower court able to square its conclusion that Plaintiff occupied a nonconfidential position with applicable precedent. The lower court held that the Plaintiff's civil service status simultaneously vested Plaintiff with both due process and First Amendment rights, and thus federally enforceable rights to both state and federal fact finding on the propriety of his discipline. Specifically, the court of appeals stated that, because Plaintiff "was neither a confidential employee nor a policymaker," he was entitled to due process guarantees of a "pre-suspension hearing, prior notice of suspension, an opportunity to

respond and notice of the charges against him." (App. 5). However, whether Plaintiff was a "confidential employee [or] policymaker" should have been irrelevant, as a matter of constitutional law, to his due process right to a hearing. Principles of due process were implicated solely because of Plaintiff's status as a merited civil servant, and the corresponding state created property interest in employment. *See Board of Regents v. Roth*, 408 U.S. 564 (1972).

Conversely, the Seventh Circuit also concluded that, because Lickiss was a merited deputy for whom "cause was required" for discipline, he was entitled to the protections of the First Amendment in raising matters of public concern with the state's attorney. (App. 5-6). Once again, however, Plaintiff's entitlement to merit commission protections should have driven only the due process, but not the First Amendment, analysis. The First Amendment analysis should have focused on the Plaintiff's job duties, an inquiry which was notably absent from the lower court's analysis.

Allowing state civil service laws to dictate the *Branti* analysis will also create perverse inconsistencies and distortions within the individual states, a point well illustrated here. Under *Upton* and *Wilbur* even the lowest level Illinois deputy sheriff may be terminated for his politics or speech without offending the First Amendment. However, under the lower court's decision, once civil service protections exist, the First Amendment protects identical conduct, even by the most senior supervisory personnel, and protects them not only from termination, but from demotion, suspension, or any form of discipline. Indeed, in the present case the Plaintiff was a sergeant within the sheriff's depart-

ment with concomitant supervisory responsibilities. It turns *Branti* on its head to interpret the First Amendment as requiring a sheriff to tolerate in her top supervisors disloyalty which would warrant the termination of noncivil service deputies having far less input into the sheriff's policymaking function.

The Seventh Circuit's deferential approach essentially abdicates the federal courts' obligation to determine the content and scope of federal constitutional rights. The *Elrod/Branti* and *Connick/Pickering* lines of authority are intended to prohibit the states from disciplining certain, but not all, public employees for their political beliefs or speech. If the states can determine which employees enjoy First Amendment protections through civil service designation, then the federal protections flowing from those lines of cases becomes illusory. This point is illustrated equally whether the federal court defers totally to the states' designation of a position as confidential, or conversely, where it completely accedes to the states' designation of a position as nonconfidential. In either case, the failure to analyze the responsibilities inherent in a particular position, as required under *Branti*, defeats the very purpose of federal review.

In the present case, the County of Tazewell's grant of civil service protections to its deputy sheriffs did not, in any fashion, alter the duties statutorily imposed upon individuals occupying that position. Civil service or not, Illinois deputy sheriffs are statutorily accorded specific duties which render them confidential employees within the meaning of the First Amendment. *Upton*, 930 F.2d at 1215. Indeed, the Plaintiff in this case was a sergeant with supervisory duties, which, under *Branti*,

should have lessened his First Amendment rights rather than heightened them.

In light of the foregoing, the Court should grant *certiorari* to resolve the inter-circuit conflict as to the impact of civil service status on a *Branti* analysis and to clarify the factors governing the appropriate analysis to be applied by the federal courts in determining whether a particular position is one for which undivided loyalty is an appropriate requirement.

II.

In Concluding That Plaintiff's Civil Service Protections Qualified Him As a Nonconfidential Employee Under *Branti*, The Seventh Circuit Deprived Defendants Of Any Consideration Of Their Claim To Qualified Immunity On Plaintiff's First Amendment Claim By Failing To Determine Whether Plaintiff's Status As a Nonconfidential Employee Was Clearly Established

Governmental officials should not face liability under § 1983 unless the law is sufficiently established that it puts the official on notice that his conduct would violate the plaintiff's constitutional rights. In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court recognized that qualified immunity shields "governmental officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Five years later, in *Anderson v. Creighton*, 483 U.S. 635, 639-41 (1987), this Court addressed the "level of generality at which the relevant 'legal rule' is to be identified" and held that qualified immunity would apply

unless the constitutional right at stake was clearly established in a fact-specific particularized sense rather than merely in a general sense.

In the present context, qualified immunity insulates a governmental official who unconstitutionally terminates a nonconfidential employee in violation of the employee's First Amendment rights unless it was clearly established that the employee did not occupy a position of trust. *Wrigley v. Greanias*, 842 F.2d 955, 958 (7th Cir. 1988); *see also Wilbur*, 3 F.3d 214 (holding that *Elrod/Branti* confidential employee exception applies to free speech as well as free association claims). Similarly, even the unconstitutional termination of an obviously nonconfidential employee who spoke out on matters of public concern is subject to qualified immunity unless it was clearly established under the circumstances that the employee's interest in speaking outweighed the government's countervailing interests. *Rakovich v. Wade*, 850 F.2d 1180, 1208-13 (7th Cir.) (*en banc*), *cert. denied*, 488 U.S. 968 (1988).

A. The Seventh Circuit Overlooked Its Own Precedent Establishing the Confidential Status of Deputy Sheriffs and Instead Concluded, Without Citation to Authority, That it Was Clearly Established That Respondent's Civil Service Protections Afforded Him a Nonconfidential Employment Status

In contravention of *Anderson*'s requisite particularized analysis of the law, the Seventh Circuit failed to consider Defendants' contention that it was not clearly established that Plaintiff was a confidential employee who could automatically be terminated for either his

political beliefs or his speech without offending the First Amendment. *See Warzon v. Drew*, 60 F.3d 1234, 1238 (7th Cir. 1995); *Wilbur*, 3 F.3d at 219. If the lower court had addressed that question, it could not have concluded that Plaintiff's right not to be disciplined was clearly established for purposes of defeating Defendants' qualified immunity defense.

Five decisions decided by the Seventh Circuit from 1991 through the time of Plaintiff's discipline in 1994 reaffirmed that deputy sheriffs were confidential employees who could automatically be terminated for either their political beliefs or their speech without offending the First Amendment. *See Mitchell v. Thompson*, 18 F.3d 425 (7th Cir.), *cert. denied*, 513 U.S. 870 (1994); *Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993); *Dimmig v. Wahl*, 983 F.2d 86 (7th Cir.), *cert. denied*, 510 U.S. 861 (1993); *Wilbur*, 3 F.3d 214 (speech); *Upton* 930 F.2d 1209 (political beliefs). None of those five decisions or any other case from the Seventh Circuit had held that a different result would obtain simply because the deputy enjoyed civil service protections. The most that the Seventh Circuit had done was to suggest in *Upton* and *Wilbur* that its analysis was simplified because the deputy sheriffs in those cases did not enjoy civil service protections. *Wilbur*, 3 F.3d at 219; *Upton*, 930 F.2d at 1217, n.5. The only case in which the Seventh Circuit had specifically considered the impact of civil service protections on the *Elrod/Branti* analysis was *Shakman v. Democratic Organization of Cook County*, 722 F.2d 1307 (7th Cir.), *cert. denied*, 464 U.S. 916 (1983). In *Shakman* the court expressly rejected the contention that civil service protections controlled a determination of wheth-

er the plaintiff's position was confidential and, therefore, exempt from the protections of *Elrod/Branti*. *Id.* at 1310.

Not only did the lower court fail to explain how Plaintiff's civil service protections could trump the holdings of its own foregoing cases, it similarly did not consider cases from other circuits which were cited by Defendants for the proposition that civil service protections do not control whether an employment position is confidential for purposes of an *Elrod/Branti* analysis. *See, e.g., McCrerey v. Allen*, 118 F.3d 242 (4th Cir. 1997); *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990); *Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986).

B. The Seventh Circuit's Generalized Inquiry Caused it to Likewise Err in its Application of the *Connick/Pickering* Balancing Test

The Seventh Circuit's failure to conduct a particularized analysis of the confidential employee issue caused it to erroneously analyze the constitutionality of Plaintiff's discipline under the fact-intensive *Connick/Pickering* balancing test. However, even if the court of appeals was correct in applying *Connick/Pickering*, it nonetheless failed to consider Defendants' qualified immunity defense.

In *Rakovich v. Wade*, 850 F.2d 1180, 1213 (7th Cir.) (*en banc*), *cert. denied*, 488 U.S. 968 (1988), the Seventh Circuit explicitly recognized the broad application of qualified immunity to cases involving the *Pickering* balancing test and noted that before a defendant official may face liability, the facts of the existing case

law must correspond closely to the facts at hand. Notwithstanding that reasoning, the lower court never addressed whether it was clearly established, under prevailing case law, that Plaintiff's right to report information to the state's attorney concerning Deputy Steinborn outweighed the sheriff's countervailing right to maintain discipline and respect for orders.[11] This omission was particularly noteworthy because Sheriff Drexler explicitly ordered Lickiss not to conduct any further investigation and to treat the matter confidentially, and that she was requesting an outside agency, the Illinois State Police, to investigate the matter.[12]

Plaintiff's decision to ignore this order and continue to conduct his own investigation without advising his employer created an overriding issue of insubordination. Similarly, Lickiss' decision to deliver a report of his investigation to the state's attorney, behind the Sheriff's back, and his apparent decision to discuss the matter with the media,[13] also constituted insubordination. The Seventh Circuit, however, bypassed the issue of insubordination when it held, in reliance on two

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[11] Defendants never disputed that, absent a direct order to the contrary, Plaintiff possessed the right to inform the state's attorney about matters uncovered during an investigation.

[12] The state police declined Sheriff Drexler's request. (R. 92, Ex. 5 at 46).

[13] Lund and others told Sheriff's investigators that Lickiss was working with a local reporter on his story, though Lickiss denied this was true. (R. 92, Ex. 33; Ex. 34; Ex. 41 at 8).

cases that did not involve insubordination,[14] that Plaintiff had a clearly established right to ignore Sheriff Drexler's order.

The lower court's failure to address the insubordination issue was particularly puzzling, given its previous recognition that decisionmakers possess the right to "punish thirteenth-hour efforts to undermine their authority and disrupt the functioning of their offices by subordinates seeking to undercut final decisions with which they disagree." *Wright v. Ill. Dept. of Children and Family Servs.*, 40 F.3d 1492, 1504 (7th Cir. 1994). *See also Campbell v. Towse*, 99 F.3d 820 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1254 (1997); *Domiano v. Village of River Grove*, 904 F.2d 1142, 1146 (7th Cir. 1990) (holding that refusal to follow ordinance, despite commendable motivation, constituted insubordination justifying dismissal). Not only did the lower court not consider Lickiss' insubordination in the *Connick/Pickering* balancing process, it did not explain how the above-cited cases were inapplicable.[15]

As the foregoing illustrates, the Seventh Circuit ignored this Court's requirement that a particularized analysis be conducted before a constitutional right may

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[14] The Seventh Circuit relied upon *Glass v. Dachel*, 2 F.3d 733 (7th Cir. 1993), and *O'Brien v. Town of Caledonia*, 748 F.2d 403 (7th Cir. 1984).

[15] Moreover, the Seventh Circuit's broad conclusion that the sheriff could not preclude Plaintiff from providing information to the state's attorney ignored the fact that a county sheriff's office is entirely separate from the state's attorney's office, although the two must obviously cooperate in many ways. Under Illinois law a sheriff is entitled to control all of the internal operations of her office as she sees fit. 55 Ill. Comp. Stat. 5/3-6018.

be deemed clearly established for purposes of public official liability under § 1983. This approach impermissibly deprived Defendants of a fair consideration of their claim to qualified immunity. The failure to undertake the requisite analysis sets a precedent which will curtail the right of public officials to rely on the defense of qualified immunity in cases where it was not apparent that a particular course of conduct might later be deemed constitutionally impermissible. Accordingly, this Court should grant *certiorari* on Petitioners' claim to qualified immunity on Respondent's First Amendment free speech claim.

III.

The Court Of Appeals' Conclusion That Principles Of Due Process Entitled The Plaintiff Sheriff's Sergeant, Who Was Suspended Without Pay For Twelve Days, To a Presuspension Hearing, In Addition To a Pretermination Hearing, Contravened This Court's Decision In *Gilbert v. Homar*, 117 S. Ct. 1807 (1997)

"'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). To determine what process is due, this Court has instructed that three primary factors be balanced: "First, the private interest that will be effected by the official actions; second, the risk of an erroneous depri-

vation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest." *Mathews*, 424 U.S. at 335.

In the context of public employment, no process is due unless a public employee first establishes that he enjoys a property interest in employment, a threshold not in dispute here.[16] *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972). Once a property interest is present, principles of due process require the government to provide a predeprivation hearing before terminating public employment. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).[17]

While the right to a pretermination hearing has long been established by this Court (*see Loudermill*), a public employee's right to a presuspension hearing was recently addressed by this Court for the first time in *Gilbert v. Homar*, 117 S. Ct. 1807, 1811 (1997). In *Gilbert* this Court announced that failure to provide a presuspension hearing did not violate the due process rights of a tenured public employee who was charged with a felony, so long as he received a sufficiently prompt postsuspension hearing. *Id.* at 1812-14.

Here the Seventh Circuit faulted Defendants for failing to provide Lickiss with a presuspension hearing. Without any analysis or discussion of the *Mathews* fac-

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[16] Defendants have not contested that Plaintiff's merit commission protections afforded him a property interest in his position.

[17] There is no issue here with respect to the adequacy of pretermination process, as the government undisputedly complied with *Loudermill*'s pretermination hearing requirement.

tors or of *Gilbert*, the Seventh Circuit concluded that under its decision in *Muscare v. Quinn*, 520 F.2d 1212 (7th Cir. 1975), Lickiss was entitled to "a pre-suspension hearing, prior notice of suspension, notice of the charges against him, and an opportunity to respond." (App. 4-5). *Muscare*, however, provided no basis for so holding, given that in *Ciechon v. City of Chicago*, 634 F.2d 1055, 1059-60 n.12 (7th Cir. 1980), the Seventh Circuit specifically noted that this Court's decision in *Barry v. Barchi*, 443 U.S. 55 (1979), overruled *Muscare* on the issue of entitlement to a presuspension hearing. In *Barry* this Court held that a statute authorizing summary suspensions of harness racing trainers without a presuspension hearing did not affront the due process clause. 443 U.S. at 63-66.

The Seventh Circuit's decision should not stand because all of its decisions and this Court's decisions in *Gilbert* and *Barry* contravene the conclusion that principles of due process entitled Plaintiff to a pre-suspension hearing, in addition to a pretermination hearing. Indeed, not a single post-*Barry* decision has concluded that principles of due process were violated by the suspension of an employee without a hearing, so long as a pretermination hearing was supplied and a full panoply of post-termination procedures were available. *See Gilbert*, 117 S. Ct. 1807 (holding that a police officer charged with a felony was not entitled to a presuspension hearing so long as he received a sufficiently prompt postsuspension hearing, because, *inter alia*, his lost income was relatively insubstantial, in contrast to a termination situation); *Jones v. City of Gary, Ind.*, 57 F.3d 1435 (7th Cir. 1995) (upholding suspension of insubordinate firefighter where presus-

pension hearing not afforded); *Swanson v. Village of Lake in the Hills*, 962 F.2d 602, 604 n.2 (7th Cir. 1992) (noting that "[t]here is support for the argument that [plaintiff] could have been suspended without a predeprivation hearing); *Panozzo v. Rhoads*, 905 F.2d 135 (7th Cir. 1990) (upholding suspension without prior hearing of insubordinate police officer who had failed to make scheduled court appearances and show up for work one day); *Ciechon*, 634 F.2d 1055 (holding that no presuspension hearing was required for a fireman charged with a residency violation).

In *Gilbert* this Court emphasized that "[u]nlike the employee in *Loudermill*, who faced termination, respondent faced only a temporary suspension without pay. So long as the suspended employee receives a sufficiently prompt postsuspension hearing, the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not affected at all." 117 S. Ct. at 1813. As in *Homar*, Lickiss' suspension resulted in only a twelve-day loss of salary before he was provided an opportunity to be heard. On the other hand, the employer's interest in promptly removing an employee who was blatantly insubordinate, and reasonably viewed as a participant in a scheme to publicly discredit his boss in the media, was substantial. Lickiss was suspended on October 19, 1994, provided an opportunity to be heard on October 31, 1994, and terminated one month later on November 28, 1994 (R. 92, Exs. 44, 46, 48). Following his termination, Lickiss was afforded a full trial-like arbitration hearing which lasted several days. Principles of due process required no more. The Seventh Circuit's contrary conclusion is at odds with this Court's

analysis in *Gilbert*, and therefore, *certiorari* should be granted to ensure adherence to this Court's precedent.

IV.

In Holding That The Plaintiff's Right To a Presuspension Hearing Was Clearly Established, The Court Of Appeals Relied Solely On An Overruled Decision From 1975 And Failed To Consider This Court's Decision In *Gilbert v. Homar*, 117 S. Ct. 1807 (1997), Thereby Depriving Defendants Of Fair Consideration Of Their Claim To Qualified Immunity On Plaintiff's Due Process Claim

Even if the Seventh Circuit correctly concluded that a presuspension hearing was required, it failed to conduct a particularized analysis to determine whether the law on this issue was sufficient to meet this Court's conception of clearly established law. *See Anderson*, 483 U.S. at 639-41. Not only did the court of appeals fail to conduct a particularized analysis of the law, it appears to have foregone an analysis of any sort.

The lower court's denial of qualified immunity wholly contravened the available precedent from this Court and the Seventh Circuit. In contrast to the pretermination context, the law is far from clearly established as to whether a suspension without pay requires a predeprivation hearing in the present context. As discussed *supra*, just last year this Court first addressed "whether the protections of the Due Process Clause extend to discipline of tenured public employees short of termination." *Homar*, 117 S. Ct. at 1811. Similarly, the Seventh Circuit had never decided that *Loudermill* requires the government to provide employees with a pre-

suspension hearing.[18] To the contrary, the Seventh Circuit's most analogous decisions have all reached a contrary conclusion. *See* cases cited *supra* in Part III.

As in the First Amendment context, application of principles of due process in the present context requires a delicate balancing of interests which is difficult for the courts, let alone public officials unschooled in the governing legal principles. Here governing precedent would not have guided a public official to the conclusion that a suspension without pay violated due process when a prompt postsuspension opportunity to be heard was provided twelve days later, and that opportunity was followed by a full trial-like arbitration proceeding.

The Seventh Circuit erroneously relied solely on an overruled decision in announcing that it was clearly established that Lickiss was entitled to a presuspension hearing, in addition to the pre- and post-termination process he indisputably received. All relevant authority is inconsistent with the court of appeals' determination that Lickiss' entitlement to a presuspension hearing was clearly established. Consequently, this Court should grant *certiorari* on Petitioners' claim to qualified immunity on Respondent's due process claim.

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[18] As noted *supra*, the only case relied on by the Seventh Circuit (*Muscare v. Quinn*, 520 F.2d 1212 (7th Cir. 1975)) was decided ten years before *Loudermill* and was noted by the Seventh Circuit itself to have been overruled by *Barry v. Barchi*, 443 U.S. 55 (1979). *See Ciechon v. City of Chicago*, 634 F.2d 1055, 1059-60 n.12 (7th Cir. 1980).

CONCLUSION

For the foregoing reasons, Petitioners Mary Drexler and Ralph Hodgson respectfully submit that the Petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

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